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June 3, 1996

DOCKET FILE COPY ORIGINAL

Ms. Janice Myles
Federal Communications Commission
1919 M Street, NW - Room 544
Washington, DC 20554

Re: Disk Copy of Comments and Reply Comments Concerning Access to Rights-of-Way of Continental Cablevision, *et al.* in CC Docket No. 96-98

Dear Ms. Myles:

Enclosed, pursuant to Paragraph 292 of the captioned docket, is a diskette of the Comments and Reply Comments of Continental Cablevision, Inc.; Jones Intercable, Inc.; Century Communications Corp.; Charter Communications Group; Prime Cable; InterMedia Partners; TCA Cable TV, Inc.; Greater Media, Inc.; Cable TV Association of Georgia; Cable Television Association of Maryland, Delaware & the District of Columbia, Inc.; Montana Cable TV Association; South Carolina Cable Television Association; Texas Cable & Telecommunications Association ("Joint Cable Commenters").

If you have any questions regarding this matter, please contact the undersigned.

Sincerely,

J. D. Thomas

Enclosures

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JUN - 3 1996

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	CC Docket No. 96-98

DOCKET FILE COPY ORIGINAL

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Cable TV Association of Georgia
Cable Television Association of Maryland, Delaware & the District of Columbia, Inc.
Montana Cable TV Association
South Carolina Cable Television Association
Texas Cable & Telecommunications Association

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REPLY COMMENTS ON POLE ATTACHMENT ISSUES

Continental Cablevision, Inc., Jones Intercable, Inc., Century Communications Corp., Charter Communications Group, Prime Cable, InterMedia Partners, TCA Cable TV, Inc., Greater Media, Inc., Cable TV Association of Georgia, Cable Television Association of Maryland, Delaware & the District of Columbia, Inc., Montana Cable TV Association, South Carolina Cable Television Association, Texas Cable & Telecommunications Association (collectively "Joint Cable Commenters"), respectfully submit these Joint Reply Comments in the captioned proceeding.

I. INTRODUCTION & SUMMARY

The Joint Cable Commenters have proposed nine straight-forward rules reflecting the economic and operational realities of pole space, specifically designed to maximize pole and conduit resources and facilitate attachment for all facilities-based carriers requiring access to these essential facilities. These Rules reflect industry practice, economic and operational realities of pole and conduit occupancy, and are based on the Commission's 18 years of experience in adjudicating pole attachment disputes. Adoption of the Nine Rules essentially would codify the

Commission's extensive experience in pole attachments and provide a practical national framework for access.

In their initial comments, telephone and electric utilities alike attempt to leverage their ownership and control of essential pole and conduit facilities to secure a stranglehold over communications conductors. Congressional intent is clear that non-discriminatory access is the rule. Yet in service of their anticompetitive objective, the utilities seek *carte blanche* authority to determine who can compete and on what terms. The utilities propose to retain unfettered discretion to warehouse pole space, force providers into communications facilities leaseback, and deny attachment permits for any of a number of illegitimate reasons unrelated to safety or sound engineering practice.

It simply is not possible in this competitive environment to proceed on an *ad hoc* case-by-case basis without a set of reasonable, universally applicable access standards. Adoption of the Nine Rules would put pole owners and attaching parties alike on notice of the general parameters of reasonable conduct. The difficulties faced by cable operators and other attaching parties over the years in gaining access at reasonable rates and under reasonable terms and conditions prove that specific access standards, with utility pole owners carrying the burden of proof that the denial was not unreasonable, now are required by Section 224(f)(1). When *these* specific standards are violated, *then* expedited complaint and preliminary relief procedures would accommodate any needed refinements for particular cases.

Finally, Section 251(b)(4) requires that these standards apply equally to both certified and non-certified states, and, contrary to the utilities' arguments, there is no

constitutional dimension to the Act's new access provisions.

II. THE UTILITIES ARE ATTEMPTING TO LEVERAGE THEIR CONTROL OVER ESSENTIAL POLE AND CONDUITS IN ORDER TO MONOPOLIZE NEW COMMUNICATIONS FACILITIES

In our experience, where there is a will to cooperate, joint use is not only feasible but eminently workable. Unfortunately, the utility comments manifest an extraordinary and massive resistance to cooperating with cable television and telecommunications companies and to acknowledging the FCC's crucial role in promoting a competitive communications marketplace. Predictably, the utilities invoke the mantra of safety and the importance of electrical power as justification for leaving them with *carte blanche* authority to deny access to essential poles and conduits. They pay lip service to competing needs with an empty offer to "negotiate" such concerns on a case-by-case basis, or to resolve each and every issue in FCC adjudication. At the same time, they protest that none of this can apply to existing contracts, under which every single cable operator in the nation now operates, and that nondiscrimination cannot possibly mean treating others as they would themselves. These are transparent attempts by telecommunications competitors to disadvantage their competition or to profiteer at public expense.

A. The Pole Owners Are Telecommunications Competitors

The very utilities that proclaim themselves to be guardians of the electric grid, pole and conduit resources, and the public interest either already are current or imminent direct

competitors to cable television operators and other telecommunications providers.[1] Several multi-state public utilities filing comments in this proceeding either already have been designated Exempt Telecommunications Carrier ("ETC") by this Commission, or have submitted currently pending applications.[2] Numerous utilities which have never been restricted by the Public Utility Holding Company Act ("PUCHA"), including Baltimore Electric & Gas, Delmarva Power & Light, Duke Power, Montana Power Company, and Pacific Gas and Electric, are now providing communications services.

Electric utilities' march toward full-blown telecommunications services began well before the 1996 Act loosened the line of business restrictions once imposed under the PUHCA. Electric utilities have installed well in excess of 100,000 miles nationally of optical-fiber capacity under lease to telecommunications companies. These utilities spend between $2 billion and $4 billion per year themselves on telecommunications (network monitoring, "demand-side management", or "DSM") and that total is growing by more than 25 percent annually.[3] By some conservative estimates, utilities employ only 2% of their fiber network capacity for load

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[1]*See, e.g.* Alan Breznick, *Charged Up, Electric Utilities Seeing Bright Prospect in Building Broadband Networks,* Cable World, May 20, 1996 at 8.

[2]The Commission already has granted Entergy and CSW ETC status. *Applications of Entergy Technology Holding Co.*, File Nos. ETC-96-2; ETC-96-3 (Apr. 9, 1996); CSW Communications, *Application of CSW Communications*, File No. ETC-96-1 (Apr. 4, 1996). The ETC applications of Northeast Utilities, Southern Company and Allegheny Power are currently pending. *NU/Model Communications Seeks Commission Determination of "Exempt Telecommunications Company" Status*, 1996 FCC LEXIS 1739 (Apr. 8, 1996); *Southern Information Holding Co. Seeks Commission Determination of "Exempt Telecommunications Company" Status*, 1996 FCC LEXIS 1961; 1996 FCC LEXIS 1962; *Allegheny Communications Connect, Inc. Seeks Commission Determination of "Exempt Telecommunications Company" Status*, 1996 FCC LEXIS 1988 (Apr. 19, 1996). *See also* Attachment 1.

[3]*See, e.g.*, Howard Rausch, *Supplementing the Field of Dreams*, Photonics Spectra, at 25 (Oct. 1994) ("Field of Dreams") (Att. 2); George Lawton, *Shocking Competition: Electric Companies Building a Piece of the Infostructure*, Digital Media at 3 (Oct 5, 1994) ("Shocking Competition") (Att. 3).

management purposes, with the balance going unused. Hence, these broadband networks have vast amounts of spare transmission capacity available that could be applied in offering competitive video, telephone, or data services.[4]

Before the passage of the 1996 Act and the lifting of the PUHCA restrictions, the Securities and Exchange Commission ("SEC") approved the Southern Company's plans to invest $179 million in a telecommunications subsidiary, Southern Communications Services Inc., which stated its plans to build, own and operate an 800 MHz wireless digital communications system, in which 80% of the capacity was to be used to serve outside customers.[5] Previously, the SEC approved an acquisition by the Southern Company of an interest in Integrated Communications Systems Inc., ("ICS"), which was engaged in research and development for a two-way communications system over local telephone lines to offer DSM services as well as applications for cable television and electronic mail.[6] In 1987, the SEC allowed American Electric Power to make a similar investment in ICS.[7]

Also, in 1991 the SEC permitted an acquisition by Entergy Corp. of an interest in First Pacific Networks, Inc., a company engaged in research and development on a combined data, voice and video communications systems.[8] In 1994 Central & Southwest Corp. was allowed

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[4]*Shocking Competition* at 3.

[5]Mary O'Driscoll, *SEC OKs Southern's Telecommunications Venture*, The Energy Daily (Jan. 4, 1995)(Att. 4).

[6]James W. Moeller, *Step by Step; The SEC and Registered Holding Companies Slip Past PUHCA Toward Telecommunications*, Public Utilities Fortnightly, at 43 (Sept. 15, 1994) (Att. 5).

[7]*Id.*

[8]*Id.*

to form CSW Communications — a non-utility subsidiary leasing about one-half of its fibers on a planned internal fiber-optic network to companies outside of CSW's system.[9]

CSW received ETC status from this Commission on April 4, 1996.[10]

Entergy Corp., based in New Orleans, will invest $10-million to install a hybrid fiber optic/coaxial cable infrastructure and a telecommunications application called PowerView.[11] Entergy initially had asked regulators for permission to build the fiber optic/coax network to support these services to be paid in large part by utility customers. After objection from the telephone and cable companies who claimed that it was unfair cross-subsidization of a competitive network, Entergy decided to bypass the regulatory process, by undertaking a pilot program instead at shareholder's expense.[12] The telecommunications application that Entergy is using over the network, PowerView, uses only a portion of the capacity of the network. Entergy has been very upfront and vocal about its intent to exploit the excess capacity. In fact, the President of Entergy Enterprises was quoted in a company release as stating that Entergy plans on aggressively pursuing use of the surplus capacity in the PowerView communication system.[13]

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[9] *Id.*

[10] *See Application of CSW Communications, Inc.*, File No. ETC-96-1 (Apr. 4, 1996).

[11] *DSM Potential, New Revenues Lure Utility Investment in 'Information Superhighway'*, Electric Utility Week's Demand-Side Report at 1 (Feb. 3, 1994) (Att. 6).

[12] Mitch Shapiro, *Utility Power*, Cablevision at 34 (June 20, 1994) (Att. 7).

[13] *Entergy Announces a Major Development in its Residential Customer-Controlled Load Management Program*, PR Newswire (Jan. 19, 1994) (Att. 8).

Entergy received ETC status from the Commision on April 9, 1996.[14] The utilities are attempting to lull the Commission into believing that they are concerned only with protecting the integrity of their core electric services.

In our initial Comments, we offered historical and current illustrations of what occurs when pole owners are allowed unrestricted control over access to the support structures needed by their direct competitors. LECs engaged in video have informed cable operators incumbent on the poles that they could not remain a tenant on the poles unless they were willing to pay to replace those poles with poles of sufficient height to accommodate a new VDT network. Others utilities have pretended that there was no available conduit space that could be shared with dial-tone-capable fiber; then, when space was shown to be available, tripled the rental rate. Electric utilities with telecommunications interests have claimed that all available space on poles—even unoccupied space—is "reserved," and that the cable operator would have to pay to replace every pole.

Acceptance of the utilities' position that they be anointed as the benevolent arbiter of scarce pole and conduit resources would amount to assigning the fox to guard the chicken coop. The best proof of this are the arguments advanced by the utilities for the laissez-faire regime they would like the Commission to adopt.

B. The Utilities' Asserted Bases For Access Denial Far Exceed Those Contemplated In Section 224(b)(2)

Predictably, the utilities paint a doomsday scenario in which providing access by

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[14] *Applications of Entergy Technology Holding Corp and Entergy Technology Corp.*, File Nos. ETC-96-2; ETC-96-3 (Apr. 9, 1996).

communications carriers to utility poles, or even adopting FCC rules which provide for access, will jeopardize electric service and the public safety.[15] The regime they advocate is for

- the FCC to concede that the utilities know best, and decide not to worry about access to essential facilities;
- the utilities to be allowed "reservations" of space for possible future utility use, stretching long past the time limits they allow for third party attachments, and that such future use reservations be a basis for denying access or conditioning access;[16]
- the utilities to be allowed to conduct "beauty contests" between competing applicants for pole and conduit access and to extract the most favorable concessions from, and grant exclusive access solely to, the requesting party that provides them the most favorable package;[17]
- the utilities to be allowed alone to judge when there is "too much" competition in a market, and deny access as "redundant," "duplicative," or inconsistent with a leaseback regime they prefer;[18]
- the utilities to deny access to compatible utility easements;[19]
- utilities to be able to deny pole access on the pretext that (on the one hand) *overlashing* fiber would create intractable wind and ice loading problems, while (on the other hand) *attachment of separate strands* would produce "visual pollution" which a utility would never allow to occur as

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[15]*See, e.g.*, Comments of American Elec. Power Serv. Corp. *et al.* at 13-15, 34-39; UTC/Edison Electric Institute, 5-11; Virginia Elec. Power Co. Comments, at 6-14.

[16]*See, e.g.*, Comments of Consolidated Edison Company of New York, Inc. at 10 (utility admits to denying access wherever 25% reserve capacity level not maintained); GVNW, Inc./Management at 9 (advocating 10 years of capacity reservation); SBC Communications at 18 (advocating access denial where current capacity does not exceed present and anticipated needs based on a five-year forecast).

[17]*See, e.g.*, Virginia Power Comments at 15.

[18]Public Serv. Co. of New Mexico Comments at 19-20.

[19]*See, e.g.*, Comments of Public Service Co. of New Mexico at 13-15; UTC/EEI at 7; Kansas City Power & Light Co. at 5.

part of its power grid.[20]

A closer examination of these arguments underscores precisely why the utilities must be constrained by the nine access rules we suggested in our Initial Comments.

1. The Commission Has Extensive Experience In Pole Attachment Matters And Its Regulation Of Pole Access Will Not Adversely Affect The Nation's Electric Grid

The utilities belittle the Commission's expertise and suggest blind deference to unilateral utility access determinations. The Commission's regulation over pole attachments has never been limited to rates alone. Not only does the Commission have considerable experience in regulating acts, practice and term and conditions of attachment, having adjudicated a number of such cases over the years, but it is required to regulate both the rates, *and* the terms and conditions of attachment. Indeed, Section 224(b)(1) clearly provides that:

> [t]he Commission shall regulate the rates, terms and conditions for pole attachments to provide that such rates, terms and conditions are just and reasonable, and shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms and conditions. For purposes of enforcing any determinations resulting from complaint procedures established pursuant to this subsection, the Commission shall take such action as it deems appropriate and necessary, including issuing cease and desist orders . . .

47 U.S.C. § 224(b)(1). This Commission itself has considered this authority and stated:

> Section 224 of the Communications Act is designed as a mechanism to provide for expeditious and simple resolution of pole attachment disputes before

[20]American Elec. Power Serv. Corp. Comments, *et al.*, at 32.

> this Commission and is intended to minimize the effect of unjust and unreasonable pole attachment practices on the wider development of cable television service to the public. The purposes of the Act are obviously disserved if this mechanism is undermined by retaliatory measures and contract terms which may constitute an unjust and unreasonable term and condition

Tele-Communications, Inc. v. South Carolina Electric & Gas Co., PA-83-0027, Mimeo 5957 ¶ 7 (August 16, 1983).

The Commission has repeatedly exercised this authority in adjudicated cases, *id.*; *see also Heritage Cablevision Assocs. of Dallas, L.P. v. Texas Utils. Elec. Co.*, 6 F.C.C.R. 7099 (1991), *aff'd sub nom., Texas Utils. Elec. Co. v. FCC*, 997 F.2d 925 (D.C. Cir. 1993); *Whitney Cablevision of Indiana, Ltd. v. Southern Indiana Gas & Electric Co.*, PA-84-0017, Mimeo No. 841 (November 16, 1984); *Newport News Cablevision, Ltd. v. Virginia Elec. and Power Co.*, 7 FCC Rcd. 2610 (1992),[21] and in informal mediation of innumerable disputes. *See, e.g., Cable Associations of Maryland, Delaware and the District of Columbia, Inc. v. Chesapeake and Potomac Tel. Co. of Maryland, Inc.*, 5 F.C.C. Rcd. 2571 (1990) (approving extensive statewide settlement agreement for acts and practices complaint proceeding). The Commission has a substantial body of binding adjudicated precedent for resolving pole disputes, and solid institutional knowledge of pole attachments.

We explained in detail in our initial comments what makes poles and conduits

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[21]Contrary to VEPCO's representations in its initial comments that the Commission found VEPCO's requirements to be reasonable, the Commission found that VEPCO had imposed unreasonable guying practices on telephone poles and that VEPCO had unlawfully imposed excessive inspection costs on the cable operator for services from which the operator derived no benefit. *Newport News*, 7 FCC Rcd. at 2612.

available for attachment. The applicable engineering and safety codes are not magic, nor are they impenetrable. Under current practice, space is available as measured under the National Electrical Safety Code ("NESC") based upon current use and pending applications for attachment accepted in ordinary course of business without discrimination. All poles and conduits are deemed suitable and available for attachment or use Poles may not be removed from joint use merely because the utility would prefer that only its own fiber be attached, nor because the utility is unwilling to follow standard makeready and NESC practices. Conduit congestion may be relieved by pulling (installing) inner duct, which is commonly placed in new construction and is used by telephone companies to relieve congestion in downtown business districts. Any concerns about reliability or safety are satisfied by adherence to NESC. Parties should not be permitted to use unnecessary engineering (*e.g.* separately stranding commonly owned conductors on strands which are 12" apart) in order to consume available pole space and displace potential entrants.

The utilities seek to obfuscate these principles in a patronizing effort to divest the FCC of authority in this area. These utility efforts must be rejected.

2. The Commission Must Reject Utility Efforts To Warehouse Pole Space And Deny Access On The Basis Of Claims Of Reservation For Future Use

As Joint Cable Commenters have shown in Rule 1, pole and conduit access must be provided without makeready or changeout costs where there is space available based on current, not future use. Utility claims that they must "reserve" pole and conduit capacity for future service needs must be rejected.

As is evident from the initial comments of the utility parties, utility claims of space reservation for "future use" is merely code for "access if we say so." Some of the utilities (such as Duke Power), have simply announced that henceforth all space on the pole is deemed reserved for future use by the utilities. Others have submitted comments asking that they be allowed to "project" a "planning horizon" as much as 10 years, and deny any third party the right to use that space unless the applicant pays to change out a pole at very substantial cost.[22]

Under standard utility practices today, a pole is deemed available for use without changeout if there is space available consistent with current uses or pending applications for permits. The most common arrangement is to treat a pending application for permit as "using" the first 12 inches of space if the application has been accepted (i) from a party with a valid pole contract with the utility; (ii) prior to receipt of the second application; and (iii) if the application meets the processing standards of the utility pole owner. Utilities routinely impose limits on third parties in order to limit the potential for hoarding pole space. Thus, a permit for a third party to attach will expire if not utilized within a fixed period, such as 90 or 180 days; and there may be a limit on the number of poles which may be under permit to one party at any one time. Thus, for the utilities to contend that space on all poles should be deemed "under permit" to themselves or their affiliates regardless of concrete preexisting plans or preexisting applications, and indefinitely into the future, is pure discrimination, and an effort to defeat the very right of

[22]*See, e.g.*, Comments of Consolidated Edison Company of New York, Inc. at 10 (utility admits to denying access wherever 25% reserve capacity level not maintained); GVNW, Inc./Management at 10 (advocating 10 years of capacity reservation); SBC Communications at 18 (advocating access denial where current capacity does not exceed present and anticipated needs based on a five-year forecast).

nondiscriminatory access prescribed by Congress.

It would be one thing if a utility has previously scheduled attachments for its use within the same time frame as that which is prescribed for the typical cable pole attachment permit to expire (such as 90 to 180 days). Likewise, a utility's affiliate could "reserve" space just as a third party can, by applying for it in the ordinary course under the same terms and conditions as are applied to third party attachments. But open, limitless reservations of all space to the utility and its affiliates is wholly inconsistent with the nondiscrimination and imputation rules provided by Congress.

3. "Beauty Contests"

The utilities also advocate a regime in which they are the exclusive arbiters of the appropriate amount of competition in a market. For example, some utilities argue that because their pole assets are part of their rate base, they should be permitted to use "business judgment" to make access decisions. Comments of American Elec. Power Serv. Corp., *et al.* at 7, 14-15. Others argue, as we will discuss below, that the potential for "redundancy" is so great that the utility should decide how many competitors should be allowed on the pole. *See, e.g.*, Comments of Public Serv. Corp. of New Mexico at 19-20. Another utility stated that "if two entities seek access to poles concurrently and capacity exists to accommodate only one, the electric utility should be permitted to select the entity that offers the most favorable terms [to the pole owner]." Virginia Power Comments at 15. It is difficult to imagine positions more starkly antithetical to Congress' non-discrimination provisions. Under their proposal, utilities would be permitted to deny (or auction) access solely to extort maximum concessions from applicants. Competitors

would be denied the chance to compete on nondiscriminatory terms, and the public would be denied a choice of telecommunications providers. The utilities do not even pretend to justify this under the pro-competitive principles of the 1996 Act.

What is past is prologue. The history of telephone conduct shows discrimination in favor of compliant, preferred facilities providers, to the detriment of competition engendered by independent facilities-based providers. Our initial comments provided the outline, but examples from those cases will illustrate the point further.

In *TeleCable Corporation*,[23] the Commission was faced with a LEC which had its own favored cable television affiliate. The LEC controlled the communications space on all poles in Illinois, and made it known to the Bloomington, Illinois franchising authority that the independent cable operator would have no practical ability to obtain access to poles. Hearing that, the LFA awarded the sole cable franchise to the LEC's affiliate.[24] The Commission found similar situations where the LECs had engaged in conduct that was "intended to take advantage of [its] control over the telephone poles and was designed to place [independent cable operators] at a substantial competitive disadvantage."[25]

Placing utilities in the role of final arbiter of access questions will assure repetition of this historical pattern of discrimination in favor of affiliated and preferred communications

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[23] 19 FCC 2d 574, 578-79 (1969).

[24] *Id.*

[25] *Manatee Cablevision*, 22 F.C.C. 2d 841, 862 (1970), *vacated as moot*, 35 F.C.C. 2d 639 (1972); *see also California Water and Telephone Co.*, 40 F.C.C. 2d 1138 (1973) (utility doubled pole attachment rates while FCC was considering regulation).

providers.

4. The Utilities Should Not Be Allowed To Compel Leaseback Through The Pretense Of Duplicative Capacity

Some utilities argue that if *they believe* that sufficient telecommunications transport capacity exists in a particular area, then they should be permitted to deny access rather than permit "unnecessary" "duplication" of facilities. *See* Public Serv. Co. of New Mexico Comments at 19-20. The utilities' arguments should be rejected.

First, the utilities' claimed "depletion" of pole space is overstated. Cable television operators typically "overlash" fiber to the existing support strand to which coaxial cables are lashed, and thus do not consume additional pole space. The utilities may install communications capacity in the electric space, which is permitted by the NESC. Even new entrants place far fewer demands on capacity than the utilities' apocalyptic scenarios would suggest. Standard telecommunications-industry engineering and construction practice mandates one foot of separation on the pole between telecommunications facilities.[26] Pole are provisioned in five-foot increments. Thus, the very first upgrade from a 35 to a 40-foot pole, or from a 40 to a 45-foot pole, will create capacity to accommodate up to five separately stranded telecommunications attachments.

Second, the utilities' view of themselves as arbiters of the competitive market is antithetical to the 1996 Act. The Act promotes, indeed, often requires, facilities-based competition. The utilities seek instead to herd competitors into leaseback arrangements with the

[26]Clearance may be reduced to 4" if the telecommunications wires are placed on opposite sides of the pole.

utilities themselves, or with their preferred provider. This is the precise scenario that the Commission and the Justice Department sought to prevent when the pre-divestiture Bell System attempted to force cable operators to lease transport capacity from the telephone company, with tariff restraints against "too much" competition.[27]

The Commission should prevent the repetition of this historical pattern by removing access discretion from the competitive utility pole owner.

5. Utility Arguments Concerning Cable Operators' Easement Authority Must Be Rejected

The utility pole owners also seek to restrict cable operators' use of compatible utility easements, claiming, for example, that electric utility easements cannot possibly be used for telecommunications, and that every attaching party should separately obtain easements from property owners.

Even before the 1996 Act's command to open rights of way, this claim was preposterous. The utilities routinely use their easements for services far beyond their core businesses. Telephone companies transport SS7 network signalling and video. Electric utilities transport data. These use are routine under the doctrine of technological innovation. For example, in *Cousins v. Alabama Power Co.*, 597 So.2d 683 (1992), Alabama Power obtained a unanimous Alabama Supreme Court opinion that electric utilities had the right to use electric

[27]Hearings on S. 1547 Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation, 95th Cong., 1st Sess. 30 (1977); *Better T.V.*, 31 F.C.C.2d at 966-67 (independent operator "quickly took the hint about the lack of manpower to perform makeready work and accepted channel service rather than run the risk of having the competing channel service customer get such a head start as to make a grant of its request for a pole attachment agreement an empty and worthless gesture"); Plaintiff's First Statement of Contentions & Proof at 207, *United States v. AT&T*, Civ. No. 74-1698 (D.D.C. 1978).

rights-of-way and easements for fiber optic cable and telecommunications. Under common law apportionment alone, the same right is extended to third-party pole attachment lessees.[28] Under Section 621(a)(2) of the Cable Act, these very easements are declared to be compatible and apportionable. Section 621 provides: "Any franchise shall be construed to authorize the construction of a cable system over public rights-of-way, and through easements, which is within the area to be served by the cable system and which have been dedicated for compatible uses." The Committee Report accompanying the Act explains that this includes easements or rights-of-way used for utility transmission.

> Subsection 621(a)(2) specifies that any franchise issued to a cable system authorizes the construction of a cable system over public rights-of-way, and through easements, which have been dedicated to compatible uses. *This would include, for example, an easement or right-of-way dedicated for electrical, gas, or other utility transmission*

Cable Communications Policy Act of 1984, H. R. Rep. No. 934, 98th Cong., 2d Sess. 59, 1984 U.S.C.C.A.N. 4655, 4696 (emphasis added). Congress further explained: *"Any private arrangements which seek to restrict a cable system's use of such easements or rights-of-way which have been granted to other utilities are in violation of this [law] and not enforceable." Id.*

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[28]*See, e.g., Laubshire v. Masada Cable Partners*, C/A No.: 95-CP-04-988 (South Carolina Ct. of Comm. Pleas Apr. 24, 1996). *Witteman v. Jack Barry Cable TV*, 192 Cal. App. 3d 1619, 228 Cal.Rptr. 584, 586 (2d Dist. 1986), *remanded*, 240 Cal.Rptr. 449 (Cal. 1987), *cert. denied* 484 U.S. 1043 (1988); *Salvaty v. Falcon Cable Television*, 165 Cal. App. 3d 798, 212 Cal.Rptr. 31 (2d Dist. 1985), *review denied*, May 15, 1985; *Henley v. Continental Cablevision Co.*, 692 S.W.2d 825 (Mo. App. 1985); *Hoffman v Capitol Cablevision Systems Inc.*, 52 App. Div. 2d 313, 383 N.Y.S.2d 674 (3d Dept. 1976); *Joliff v. Hardin Cable Television Co.*, 26 Ohio St. 2d 103, 269 N.E.2d 588 (1971); *Clark v. El Paso Cablevision*, 475 S.W.2d 575 (Tex. Civ. App. El Paso 1971). The common law simply recognizes that the addition of a cable television wire to existing utility easements does not affect any property right retained by the owner of the underlying property.

(emphasis added).

The 1996 Amendments reiterate and strengthen these doctrines of access to easements. The Commission must reject utility efforts to defeat such access.

6. Windloading, Iceloading and "Visual Pollution" Concerns Cannot Be Used As A Subterfuge To Deny Access

The utilities also invoke the specters of wind loading, ice loading, and visual pollution as a pretext for denying access. Again, the Commission must pierce the veil to see the truth. According to the utilities, if a cable operator overlashes fiber to existing strand, he creates intolerable loading problems. But if the cable operator attaches a separate strand, he creates intolerable visual blight.

While we do not doubt that utilities have environmental concerns to contend with in their business, we submit that the Commission should regard protests of aesthetic blight skeptically when they come from the owners of the electrical production system, and the aerial transmission and distribution grid. We have never known an electric utility to forgo its own diversification into telecommunications because of such acute sensitivity to outdoor aesthetics.

The concerns expressed by the utilities about wind and iceloading are not pure fantasy—but they come close to it. Existing cable strand has, since time out of mind, been overlashed with coaxial trunk cable, new amplifiers, and other attachments without such concerns being expressed. Only with the advent of fiber did the utilities discover their concerns that adding a fiber (which is thinner and lighter than 75 trunk coaxial distribution cable, the previous

trunk of choice) might create wind and iceloading problems.[29] Utilities dispensing with the charade have admitted that there are standard configurations which may be overlashed without any fears of overload. For example, by contract, Georgia Power allows cable operators to overlash fiber to coax without delay or additional paperwork as long as the diameter of the resulting bundle does not exceed 6 inches, a size which accommodates almost the entire rebuild of a cable system to the standard hybrid fiber coaxial architecture specified in the FCC Form 1235. Thus, the Commission must reject utility efforts to impose any *a priori* restriction against or delay of overlashing.[30]

C. The Utilities' Definition Of Non-Discrimination

The utilities argue that the Section 224(f)(1) non-discriminatory access provision doesn't mean what it says. The utilities' erroneous view is that Congress intended to create two classes of occupying parties: (1) third parties unaffiliated with the pole owner seeking access and (2) the utility itself and its (communications) affiliates. The utilities argue that non-discrimination within the meaning of Section 224(f)(1) is intended only to apply to this first class of pole occupant, third parties, not to the utilities or its affiliates.[31] Any approach favoring the pole

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[29]The NESC, which is the industry standard for outside plant construction, contains detailed engineering and construction criteria which account for wind- and iceloading concerns. *See* NESC Tables 250-1 and 250-2.

[30]FCC Public Notice, DA-95-35 (Jan. 11, 1995) (utility pole owners cautioned "to be aware of their responsibilities pertaining to cable television pole attachments" and warned against "unreasonably preventing cable operators from 'overlashing' fiber to their existing lines")

[31]*See, e.g.,* Comments of American Electric Power Corp. *et al.* at 12-14; Comments of UTC/Edison Electric Institute at 5; Comments of Connecticut Light & Power, *et al.* at 2; Comments of Ameritech at 34; Comments of Pacific Telesis at 19-20 (the Act does not require or suggest that the carrier must treat itself the same as other attaching parties);Comments of GTE Service Corp. at 23

owner or its affiliate would gut the plain meaning of the statute's clear non-discrimination command and the requirement of Section 224(g) that utilities impute an amount equal to what its pole costs would be were it not the pole owner.

The clearest evidence of the logical consequence of the utilities' position is presented by Ameritech. Ameritech contends that the most logical interpretation of Section 224(f)(1) is that LECs are only required to provide access "that is nondiscriminatory between unaffiliated carriers." Ameritech Comments at 34. According to Ameritech's view, it may grant and enjoy preferential pole access for Ameritech New Media Enterprises ("ANME") (its franchised cable television division) because ANME is affiliated with Ameritech (the LEC), which has joint use agreements with electric utilities. Under the utilities' interpretation, Ameritech may handicap competing cable television operators because they do not fall into the same (affiliated) "class" as ANME. Similarly, UTC and EEI advocate that this definition of non-discriminatory access should apply to utility leaseback facilities. UTC/EEI Comments at 7

Ameritech's and the utilities' breathtaking repudiation of the nondiscrimination provisions of the Act must be rejected as merely one more effort to defeat the open competition and imputation model adopted by the 1996 Act

D. The Utilities Must Carry The Burden Of Proof That Access Denials Are Not Unreasonable

In our initial Comments, we demonstrated that in the ordinary course of business, all poles and conduits are available or may be made available for attachment. The utilities here seek a regime under which they are given *carte blanche* to deny or delay attachments, subject

only to a cable operator's or telecommunications carrier's right to adjudicate each and every access dispute at the FCC. Given the utilities' manifest hostility to open access, such a regime is calculated to inundate the Commission with more complaints than can be processed, and to leave applicants for attachment with the practical choice of facing irreparable market entry delays or to accede to the demands of utilities.

In order for the mandatory access provisions to accomplish their intended purpose, the Commission must adopt the straightforward principles suggested in the Nine Rules in our Initial Comments and assign to utilities seeking to deny access the burden of proving that denial was not unreasonable. The need for this rule is particularly acute where the denial relates to access to underground facilities, where visual plant inspection in most cases is infeasible.

In the vast majority of underground access situations, cable operators and other attaching parties are at the mercy of the conduit owner's representations that available duct capacity is full, or reserved for future use. Often, these representations prove untrue and access is granted only through political intercession by a regulator. *See, e.g., Multimedia Cablevision, Inc. v. Southwestern Bell Telephone Co.*, P.A. No. 95-008, Complaint, ¶¶ 13-15 (filed Dec. 30, 1994).

Utility pole and conduit owners are the only entities that possess accurate records of underground facilities and they rarely share those records with others. Similarly, utilities seldom, if ever, allow cable operators and other attaching parties to survey underground plant. Accordingly, the Joint Cable Commenters fully endorse AT&T's proposal that utilities provide attaching parties their cable plats and conduit prints. AT&T Comments at 9. *Bona fide* utility